

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

RENE FERNANDEZ,

Petitioner,

vs.

JAMES GREG COX, *et al.*,

Respondents.

Case No.: 2:13-cv-02158-GMN-VCF

**ORDER**

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner. Before the Court is Respondents' Motion to Dismiss (ECF No. 30).

**I. BACKGROUND**

Following a jury trial in the Eighth Judicial District for the State of Nevada, Petitioner was convicted of Count 1, conspiracy to violate controlled substance act, Count 2, trafficking in controlled substance, and Count 3, transport of a controlled substance. (Ex. 2, ECF No. 31-2). As to Count 1, the Appellant was sentenced to a maximum of seventy two months with a minimum parole eligibility after twenty four months. (*Id.*). As to Count 2, to a maximum of twenty five years with a minimum parole eligibility after one hundred and twenty months, to run concurrent with Count 1. (*Id.*). As to Count 3, to a maximum of seventy two months with a minimum parole eligibility after twenty four months, to run concurrent with Counts 1 and 2. (*Id.*). The judgment of conviction was entered on May 26, 2011. (*Id.*). Petitioner appealed his conviction. (Ex. 3, ECF No. 31-3). On February 8, 2012, the Nevada Supreme Court affirmed Petitioner's conviction. (Ex. 5, ECF No. 31-5). Remittitur issued on March 12, 2012. (Ex. 7, ECF No. 31-8).

1 On August 10, 2012, Petitioner filed a *pro se* state petition for a writ of habeas corpus.  
2 (Ex. 6, ECF No. 31-6). On November 27, 2012, the state district court denied the petition. (Ex.  
3 8, ECF No. 31-9). Petitioner appealed the denial of his state habeas petition, and on October  
4 16, 2013, the Nevada Supreme Court affirmed the denial of the state habeas petition. (Ex. 9,  
5 ECF No. 31-10).

6 On November 19, 2013, Petitioner dispatched—mailed or handed to a correctional  
7 officer for mailing—his federal habeas petition to this Court, which was filed on the docket on  
8 June 13, 2014. (Petition ¶ 5, ECF No. 7). However, on July 14, 2014, Respondents filed a  
9 Motion to Dismiss, asserting that Petitioner’s petition contained no signature, no statement  
10 under penalty of perjury, and no verification. (Mot. Dismiss 2:11–13, ECF No. 9).  
11 Subsequently, on September 10, 2014, the Court granted the Motion to Dismiss, ordering  
12 Petitioner to sign page 9 of the petition form in the appropriate locations and re-file his petition  
13 with the signed page of the petition within fifteen days from the date of entry of the order. (ECF  
14 No. 13).

15 Petitioner then filed a Motion for Clarification and Correction, complaining that the  
16 signed petition he was required to file actually was filed in another, now closed case, 2:14-cv-  
17 01595-JAD-CWH, on September 29, 2014. (ECF No. 16). The clerk did that because  
18 Petitioner did not put the case number of this action on the petition. Accordingly, on December  
19 19, 2014, the Court transferred the petition from the other action into this action. (*See* Am. Pet.,  
20 ECF No. 21).

21 Respondents filed the instant Motion to Dismiss on February 24, 2015. (ECF No. 30).  
22 Petitioner sought and received an extension of time in which to file his response to the Motion  
23 to Dismiss. (ECF Nos. 33–34). The deadline for Petitioner to file a response to the Motion to  
24 Dismiss has expired, and Petitioner has not filed a response with the Court. The failure to  
25 oppose the Motion constitutes consent to granting the Motion pursuant to Local Rules 7–2(d).

Petitioner's failure to oppose the Motion to Dismiss constitutes adequate grounds to grant the Motion, however, the Court will analyze the arguments made in the Motion to Dismiss.

## **II. DISCUSSION**

### **A. Timeliness**

In the Motion to Dismiss, Respondents assert that the federal habeas petition is untimely. (Mot. Dismiss 5:23–6:18). The Antiterrorism and Effective Death Penalty Act (AEDPA) amended the statutes controlling federal habeas corpus practice to include a one-year statute of limitations on the filing of federal habeas corpus petitions. With respect to the statute of limitations, the habeas corpus statute provides:

(d)(1) A 1–year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitations under this subsection.

1 28 U.S.C. § 2244(d).

2 For purposes of the AEDPA limitations period, “a judgment becomes ‘final’ in one of  
3 two ways—either by the conclusion of direct review by the highest court, including the United  
4 States Supreme Court, to review the judgment, or by the expiration of the time to seek such  
5 review, again from the highest court from which such direct review could be sought.” *Wixom v.*  
6 *Washington*, 264 F.3d 894, 897 (9th Cir. 2001). “[W]hen a petitioner fails to seek a writ of  
7 certiorari from the United States Supreme Court, the AEDPA’s one-year limitations period  
8 begins to run on the date the ninety-day period defined by Supreme Court Rule 13 expires.”  
9 *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). United States Supreme Court Rule 13.1  
10 provides that a petitioner has ninety days from the entry of judgment or entry of an order  
11 denying rehearing, within which to file a petition for certiorari. Sup.Ct. R. 13.1. Rule 36(a) of  
12 the Nevada Rules of Appellate Procedure states that “[t]he filing of the court’s decision or order  
13 constitutes entry of judgment.” Where a petitioner pursues a direct appeal to the state’s highest  
14 court but declines to pursue a petition for writ of certiorari with the United States Supreme  
15 Court, the petitioner’s conviction becomes final upon the expiration of the time to file a petition  
16 for writ of certiorari. *See Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009). Once the  
17 judgment of conviction becomes final, the petitioner has 365 days to file a petition for relief  
18 under 28 U.S.C. § 2254, with tolling of the time for filing during the pendency of “a properly  
19 filed application for State post-conviction or other collateral review with respect to the pertinent  
20 judgment or claim....” 28 U.S.C. § 2244(d)(2).

21 In the instant case, the judgment of conviction was entered on May 26, 2011. (Ex. 2,  
22 ECF 31-2). The Nevada Supreme Court's order of affirmance on direct review was filed on  
23 February 8, 2012. (Ex. 5, ECF No. 31-5). Because Petitioner did not file a petition for writ of  
24 certiorari to the United States Supreme Court, the conviction became final on May 8, 2012,  
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1 which is ninety days after the Nevada Supreme Court filed its order of affirmance.  
2 Accordingly, the AEDPA statute of limitations began to run on May 8, 2012.

3 On August 10, 2012, when Petitioner filed his state habeas petition, 94 days of untolled  
4 time for filing a federal petition had elapsed. (Ex. 6, ECF No. 31-6). The AEDPA limitations  
5 period was tolled until Petitioner's state habeas petition and appeal from the denial of the  
6 petition was resolved by the Nevada Supreme Court. *See* 28 U.S.C. § 2244(d)(2). On October  
7 16, 2013, the Nevada Supreme Court entered an order affirming the denial of Petitioner's post-  
8 conviction state habeas petition. (Ex. 9, ECF No. 31-10). The Nevada Supreme Court issued  
9 remittitur on November 14, 2013. *See* Nev. R. App. P. 41. The period of tolling under 28  
10 U.S.C. § 2244(d)(2) ended with the Nevada Supreme Court's issuance of remittitur on  
11 November 14, 2013. The AEDPA statute of limitations began to run again and expired 271  
12 days later, on August 12, 2014.

13 If the Court treats Petitioner's petition as filed on September 29, 2014, when Petitioner  
14 refiled his signed petition that was entered in a new action, the petition is untimely. However,  
15 if the Court treats Petitioner's petition as filed on November 19, 2013, the date Petitioner  
16 dispatched—mailed or handed to a correctional officer for mailing—his federal habeas petition  
17 to this Court, the petition is timely.

18 Rule 3(b) of the Rules Governing Section 2254 Cases in the United States District  
19 Courts provides that “[t]he clerk must file the petition and enter it on the docket.” The  
20 Advisory Committee Note to Rule 3 further explain as follows:

21 [The AEDPA] added a one-year statute of limitations to petitions  
22 filed under § 2254, *see* 28 U.S.C. § 2244(d)(1). Thus, a court's  
23 dismissal of a defective petition may pose a significant penalty for a  
24 petitioner who may not be able to file a corrected petition within the  
25 one-year limitations period. The Committee believed that the better  
procedure was to accept the defective petition and require the  
petitioner to submit a corrected petition that conforms to Rule 2.  
Thus, revised Rule 3(b) requires the clerk to file a petition, even  
though it may otherwise fail to comply with Rule 2.

1 Advisory Committee Note to Rule 3, Rules Governing Section 2254 Cases. Thus, the Court  
2 deems the Petitioner's federal petition to be filed on November 19, 2013. *See Houston v. Lack*,  
3 487 U.S. 266, 270 (1988) (pursuant to the "mailbox rule," federal courts deem the filing date of  
4 a document as the date that it was given to prison officials for mailing). Accordingly, the Court  
5 finds that Petitioner timely filed his petition and denies Respondents' Motion to Dismiss on this  
6 basis.

### 7 **B. Exhaustion**

8 Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust state court  
9 remedies on a claim before presenting that claim to the federal courts. To satisfy the  
10 exhaustion requirement, the claim must have been fairly presented to the state courts  
11 completely through to the highest court available, in this case, the Nevada Supreme Court. *See*,  
12 *e.g., Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003) (en banc); *Yang v. Nevada*, 329  
13 F.3d 1069, 1075 (9th Cir. 2003). In the state courts, the petitioner must refer to the specific  
14 federal constitutional guarantee and must also state the facts that entitle the petitioner to relief  
15 on the federal constitutional claim. *Shumway v. Payne*, 223 F.3d 983, 987 (9th Cir. 2000). Fair  
16 presentation requires that the petitioner present the state courts with both the operative facts and  
17 the federal legal theory upon which the claim is based. *See, e.g. Castillo v. McFadden*, 399 F.3d  
18 993, 999 (9th Cir. 2005). The exhaustion requirement ensures that the state courts, as a matter  
19 of federal-state comity, will have the first opportunity to pass upon and correct alleged  
20 violations of federal constitutional guarantees. *See Coleman v. Thompson*, 501 U.S. 722, 731  
21 (1991).

22 Moreover, to exhaust a claim, a petitioner must have presented his federal constitutional  
23 issue before the highest available state court "within the four corners of his appellate briefing."  
24 *Castillo*, 399 F.3d at 1000. The state's highest court is "not required to comb the trial court's  
25 decision to discover [a] federal constitutional issue ..." nor is it "required to review the parties'

1 trial court pleadings to see if it [can] discover for itself a federal constitutional issue.” *Id.* (citing  
2 *Baldwin v. Reese*, 541 U.S. 27 (2004)) (declining to require state appellate judges to read lower  
3 court state opinions).

4 Respondents assert that Petitioner failed to exhaust Ground 1(1) “regarding counsel’s  
5 failure to challenge the alleged failure of the State to meet its burden of proof under the  
6 scintilla-of-evidence standard in the preliminary hearing.” (Mot. Dismiss 6:20–22). However,  
7 the allegations contained in Ground 1 of Petitioner’s federal petition are nearly identical to the  
8 allegations contained in Petitioner’s post-conviction state petition, which was reviewed by the  
9 Nevada Supreme Court on appeal. (*See* Ex. 6, ECF No. 31-6; Ex. 9, ECF No. 31-10). Thus, the  
10 Court finds that Ground 1 of the petition is exhausted and may proceed. Accordingly, the  
11 Court denies Respondents’ Motion to Dismiss on this basis.

### 12 **C. Failure to State a Claim**

13 Respondents also assert that Petitioner “must choose between claim 3 and claim 7, and  
14 cannot bring both claims as they are inherently conflictual, and the facts of both cannot be  
15 true.” (Mot. Dismiss 8:17–18). However, Federal Rule of Civil Procedure 8(d)(2) expressly  
16 permits a party to set out 2 or more statements of a claim in the alternative, and the pleading as  
17 a whole is sufficient if at least one of the alternative statements is sufficient. Further, pursuant  
18 to Rule 8(d)(3), these alternative statements need not be consistent. Thus, although claims 3  
19 and 7 of the petition may be “inherently conflictual,” Petitioner is free to argue in the  
20 alternative. Accordingly, the Court denies Respondents’ Motion to Dismiss on this basis.

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1 **III. CONCLUSION**

2 **IT IS HEREBY ORDERED** that Respondents' Motion to Dismiss (ECF No. 30) is  
3 **DENIED.**

4 **IT IS FURTHER ORDERED** that Respondents shall have forty-five (45) days from the date  
5 on which this order is entered to answer the amended petition (#21). The answer must comply with  
6 Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts. Petitioner will  
7 have forty-five (45) days from the date on which the answer is served to file a reply.

8 **DATED** this 10<sup>th</sup> day of September, 2015.

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14 Gloria M. Navarro, Chief Judge  
15 United States District Judge  
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